Supreme Court, U.S.
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Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2002

CUYLER A. DODSON,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

1. Whether the government's failure to file an information under the sentencing enhancement provisions of 21 United States Code § 851(a) is "jurisdictional" and deprives a United States District Court judge of the authority to impose an increased sentence above the statutory maximum, an issue over which the circuits are divided.

2. Whether non-compliance by the government with the enhancement provisions of 21 United States Code § 851(a), which require the filing of an information, can be waived by a defendant.

3. Whether under the facts of the case Petitioner Cuyler A. Dodson during the plea proceedings below could waive, or effectively did waive, the requirement that the government file an information under the sentence enhancement statute, 21 United States Code § 851(a).

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

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CUYLER A. DODSON,
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On Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

The Petitioner, CUYLER A. DODSON, respectfully prays the Court to issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on 02 April 2002; rehearing denied 08 May 2002.

D. CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *United States v. Dodson*, 288 F.3d 153 (5th Cir. 2002), and is reproduced in the Appendix (hereinafter "A"). (A-2-22). Rehearing was denied 08 May 2002 (A-23).

E. BASIS FOR JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. § 1254(1), to review the final judgment of the United States Court of Appeals for the Fifth Circuit rendered on 02 April 2002 and finalized 08 May 2002. (A-23).

F. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitutional Provisions

a. The Due Process Clause of the Fifth Amendment in pertinent part provides: "nor be deprived of life, liberty, or property, without due process of law;"

b. The notice and jury trial provisions of the Sixth Amendment provide:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

c. United States Constitution, Article III, Section 1:

> Section 1. Judicial Power, Tenure and Compensation

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

d. United States Constitution, Article II, Section 1:

Section 1, Clause 1. Executive Power, Term

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

2. Statutory Provisions

The statutory provision under consideration is 21 U.S.C. § 851(a).

§ 851. Proceedings to establish prior convictions

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.

G. STATEMENT OF THE CASE

1. Jurisdiction Below. Jurisdiction vested in the United States District Court for the Southern District of Mississippi, Jackson Division, pursuant to 18 U.S.C. § 3231 for a federal criminal prosecution initiated under 21 U.S.C. § 844(a). Jurisdiction vested in the United States Court of Appeals for the Fifth Circuit under 28 U.S.C. § 1291 as a direct appeal from the Southern District of Mississippi.

2. Procedural Facts

Cuyler A. Dodson, a certified public accountant, was convicted in the United States District Court for the Southern District of Mississippi, Jackson Division, after a plea of guilty to simple possession of crack cocaine. Petitioner Dodson was originally indicted on two counts, possession of a firearm by a convicted felon and simple possession of cocaine base. A plea agreement was entered wherein the firearm count was dismissed on motion of the government and a conditional plea

of guilty was tendered to the drug possession count.

Petitioner Dodson entered a conditional guilty plea under Rule 11(a)(1), Federal Rules of Criminal Procedure, to Count Two of the indictment. (R5-2). The terms of the agreement were that the government would dismiss the felon in possession count, and the defendant would enter a plea of guilty to simple possession of crack cocaine with the right to appeal. The government reserved the right to re-indict on the dismissed counts. (R5-17-18). Petitioner Dodson was advised by the district court judge that his guilty plea exposed him to a sentencing range of not less than five years and not more than twenty years, and a fine of not more than $250,000, and a term of supervised release of at least two but not more than three years. (R5-14).[1]

After the conditional plea was accepted, the

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[1]The expressed sentence range was not correct under either the statute charged in the indictment, the sentencing guidelines, or 21 U.S.C. § 851(a).

Government concluded that an *Apprendi*[2] error had occurred. At the sentencing hearing on 20 October 2000, the Government moved to withdraw from the plea agreement alleging its misunderstanding (R6-2) as to the correct penalty under *Apprendi*, cited as an intervening change in law which necessitated the motion to withdraw. (R6-2). The issue presented whether or not Petitioner Dodson would be subject to a five- to twenty-year imprisonment range based on the amount of cocaine possessed under § 844, or whether he actually faced a sentencing range of 15 days to two years, because no amount of cocaine had been alleged in the indictment or proved by the government at or before the time of Petitioner Dodson's guilty plea. (R6-6-10). The district court judge continued the sentencing and requested briefs from the parties on whether or not the government could withdraw from the plea agreement. (R6-20).

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[2]*Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

A second sentencing hearing commenced on 07 November 2000. (R7). The Assistant United States Attorney announced that the Government would now abandon its motion to set aside the plea agreement. (R7-2). After addressing the case specific criminal history issues (R7-2), the Government argued that *Apprendi* and the effect of charging Petitioner Dodson under 21 U.S.C. § 844(a) resulted in a sentencing range (for a defendant who had one prior conviction) of a term of imprisonment of not less than 15 days and not more than two years. (R7-2-3).[3]

The Government now, however, requested the district court judge to sentence Petitioner Dodson to the full two years. (R7-4-5). The district court judge agreed with the government and sentenced Petitioner Dodson to two years imprisonment.

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[3]Although never specifically stated, the sentence exposure, a minimum mandatory 15 days and a maximum two years, was predicated on the enhancement of the statutory maximum alleged in the indictment by operation of the 21 U.S.C. § 851(a) enhancement procedures, which enhancement was not pled in the indictment.

(R7-18). As grounds for its ruling, the court noted the

> unusual circumstances of this case where the government made a mistake, either in charging the defendant under § 844 rather than § 841, or because the government failed to allege the amount of drugs in the indictment, where it did indict the defendant under § 844.

Defense counsel objected to the sentence. (R7-4). Mr. Dodson, who was already in custody (R7-19), was denied bail pending appeal (R7-20). Petitioner is no longer incarcerated in the custody of the Attorney General, but is serving the supervised release partition of his sentence.

3. Appeal to the Fifth Circuit Court of Appeals

On appeal to the United States Court of Appeals for the Fifth Circuit, Mr. Dodson argued *inter alia* that the mandatory procedures of 21 U.S.C. § 851(a) were not followed and that the enhanced portion of the sentence against Petitioner was not valid.[4] In answer the government argued that the issue had been

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[4]Two additional issues, denial of the motion to suppress (IBA-36-ff) and the upward sentence departure (IBA-26-ff), were also raised (IBA, pp.2–1;)

waived. (ABA-10).

The Court of Appeals for the Fifth Circuit initially affirmed. Petitioner Dodson moved for rehearing arguing that a line of cases, including Fifth Circuit precedent, had held that compliance with 21 U.S.C. § 851(a) was "jurisdictional" and that the failure to follow the statutory requirement of filing an information deprived the district court of jurisdiction to impose an enhanced sentence. The United States Court of Appeals vacated the per curiam affirmance and set the case for oral argument in Houston, Texas, on 04 February 2002. After oral argument, the Fifth Circuit Court of Appeals, in a published opinion[5] issued on 02 April 2002, held that the provisions of 21 U.S.C. § 851(a) agreed that compliance with the statutory provisions was mandatory, but concluded the defendant had waived compliance in the district court. Petitioner timely sought a second rehearing, which was denied on 08 May 2002.

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[5] *United States v. Dodson*, 288 F.3d 153 (5th Cir. 2002).

QUESTIONS PRESENTED

1. Whether the filing of an information by the government under 21 U.S.C. § 851(a) is a "jurisdictional" prerequisite to a United States District Court enhancing a Title 21 sentence, a question of law which has created a division among the circuits.

2. Whether the decision to seek an enhanced sentence lies within the exclusive province of the Executive Branch rendering inapplicable rules of waiver and forfeiture by a defendant to statutory compliance by the government with the requirement of filing an enhancement information.

3. Whether the proceedings below establish that Petitioner Cuyler Dodson knowingly and intelligently, freely and voluntarily, waived compliance with the statutory enhancement provisions of 21 U.S.C. § 851(a).

4. Whether the stated grounds for upward departure, to remedy a pleading oversight by the government in

the indictment, is a valid ground for upward departure.

H. ARGUMENT ON REASONS FOR GRANTING THE WRIT

1. A conflict among the circuits exists as to whether compliance with 21 U.S.C. § 851(a) is "jurisdictional" and subject to principles of waiver and forfeiture.

Courts have held the sentencing scheme under 21 U.S.C. § 851 is "jurisdictional." *Romero-Carrion*, 54 F.3d 15, 17-18 (1st Cir. 1995); *United States v. Wright*, 932 F.2d 868, 882 (10th Cir. 1991); *United States v. Olsen*, 716 F.2d 850, 853 (11th Cir. 1983); *United States v. Allen*, 566 F.2d 1193, 1196 (3rd Cir. 1977); *United States v. Cevallos*, 539 F.2d 1122, 1125 (5th Cir. 1996). Other circuits have been less direct calling it a "mandatory procedure." *United States v. LaVey*, 76 F.3d 671 (5th Cir. 1996). The Tenth Circuit noted the failure to file such an information "prevents or precludes a sentence enhancement." *United States v. Smith*, 984 F.2d 1084, 1087

(10th Cir. 1993) [noncompliance with § 851(a)(1) deprives the trial court of authority to impose the enhanced sentence; *United States v. Noland*, 495 F.2d 529, 533 (5th Cir. 1973)]. The First Circuit has neatly stated the issue: "a prosecutor's compliance with § 851(a)(1) is simply a necessary condition to a judge's imposing an enhanced sentence on the basis of the defendant's prior convictions." *Prou v. United States*, 199 F.3d 37, 44 (1st Cir. 1999).

The Sixth Circuit, *United States v. Williams*, 899 F.2d 1526, 1529 (6th Cir. 1990), has held that statutory compliance is mandatory, and the trial court could not excuse the failure of the government to file an information even though the defendant agreed prior to trial the enhanced penalty applied.[6] Other courts have agreed that strict compliance by the government[7] is required, *United States v. Weaver*, 905 F.2d

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[6]21 U.S.C. § 851 states that the information should be filed *before* plea and *before* trial.

[7]18 U.S.C. § 3559(c)(4) *Information filed by United States Attorney.*

1466, 1481 (11th Cir. 1990).

The issue has not yet been squarely addressed whether strict compliance by the United States Attorney is subject to waiver by agreement or acquiescence, or whether the procedure is jurisdictional and not subject to waiver according to *Prou v. United States*, 199 F.3d 37, 42 (1st Cir. 1999).[1]

In *Suveges v. United States*, 7 F.3d 6 (1st Cir. 1993), the First Circuit held that the failure to raise a § 851(a)(1) objection on direct appeal constituted a procedural default and thus required a postconviction petitioner to satisfy the cause-prejudice showing of *United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). The D.C. Circuit, Fifth and Eleventh Circuit Courts of Appeals have excused untimely filings of informations by the government when the record made clear that the defendant was aware before trial, or entry of the plea, of both the government's intent to seek enhancement

[1] *But see United States v. Dodson*, 288 F.3d 153 (5th Cir. 2002), Appendix at (A-).

and the prior conviction upon which the government sought to rely. *See United States v. Brown*, 921 F.2d 1304, 1308-09 (DC Cir. 1990); *United States v. Weaver,* 905 F.2d 1466, 1481 (11th Cir. 1990); *United States v. Thomas*, 12 F.3d 1350 (5th Cir. 1994).

The First Circuit in *Prou, supra,* 199 F.3d 45-46, traced some of the litigation history of the terminology of "jurisdiction" in circuit opinions, to reach the critical issue of the meaning of jurisdiction in the context of proceedings under 21 U.S.C. § 851(a)(1). "The imposition of a sentence is the criminal-law analog to the granting of the remedy in a civil action – neither implicates subject-matter jurisdiction." *Prou v. United States, supra*, 199 F.3d at 46. The First Circuit panel reasoned that certain defenses including statute of limitations may be waived and that untimely constitutional challenges to notice under 21 U.S.C. § 860 could be waived. These constitutional defects do not reflect the power of the

prosecution to initiate proceedings and are capable of being waived. "The principal is dispositive here for the defect upon which the petitioner relies concerns the penalty, not the government's power to initiate the underlying criminal proceeding." *Prou* rejected the contention that an enhanced sentence under 851 based on an untimely filing of the enhancement information, like a judicial decree rendered in the absence of subject matter jurisdiction, was null and void.

The Ninth Circuit addressed the issue in *United States v. Severino*, 268 F.3d 850 (9th Cir. 2001). Two members of the court characterized the jurisdictional issue as "little more than a house of cards," *Severino, supra*, 268 F.3d at 857, *citing Prou v. United States, supra,* and *United States v. Baucum*, 80 F.3d 539 (DC Cir. 1999) [resolving 21 U.S.C. § 860(a) against a jurisdictional classification] *citing United States v. Lawuary*, 211 F.3d 372, 378-79 (7th Cir. 2000). The Ninth Circuit panel bypassed the jurisdictional issue by saying the Fifth Circuit, in

Noland, supra, did not consider whether compliance was harmless (or not) and did not directly address "jurisdiction." The Fifth Circuit, according to the Ninth, simply held that enhancement was prohibited unless the government sought enhancement by filing of the requisite information prior to trial. Two years later *Noland* was re-characterized in *United States v. Cevallos* in jurisdictional terms and that the failure of the United States Attorney to file the information of the previous conviction prior to trial deprived the district court of jurisdiction to impose the enhanced sentence. "The term 'jurisdiction' appeared out of nowhere" according to the Ninth Circuit panel in *Prou.* Nonetheless, the court acknowledged that *Noland* and *Cevallos* became the authority upon which other circuits have built the requirements of § 851 into "jurisdictional" requirements. *Harris v. United States*, 149 F.3d 1304, 1306-08 (11th Cir. 1998); *United States v. Belanger*, 90 F.2d 416, 418 (7th Cir. 1992); *United States v. Lawuary,* 211

F.3d 372, 377 (7th Cir. 2000); *United States v. Wright*, 932 F.2d, 868, 882 (10th Cir. 1991).

But as Circuit Judge Thomas noted in dissenting in *Severino*, "the decision creates a conflict with eight other circuits which cannot be reconciled with the conclusion that the statute imposes a mandatory requirement that precludes sentence enhancement if not observed." *Severino, supra,* 268 F.3d at 861; *United States v. Hamilton*, 208 F.2d 1165, 1168 (9th Cir. 2000).

The instant Petition represents the class of cases where the United States Attorney has failed to file an information, as opposed to those cases where the sufficiency of the information is at issue.

The issue presented for a Court of Appeals is substantial. If defense counsel failed to object at trial, it is ineffective assistance (with actual prejudice). Failure of counsel to preserve the issue raises claims of cause and

prejudice under 28 U.S.C. § 2255. If compliance is "fundamental," failure to preserve the issue may satisfy cause-prejudice. If compliance is "jurisdictional," the issue can be raised at any time. Raising timeliness of the filing of the enhancement information for the first time in a collateral proceeding therefore presents a separate set of issues.

Other circuits have held that compliance by the United States Attorney to be jurisdictional prerequisite for the sentencing court to exercise jurisdiction. *Suveges* discussed in *Prou*; *United States v. Williams*, 899 F.3d 1526 (6th Cir. 1990); *United States v. Wright*, 932 F.2d 868 (10th Cir. 1991); *United States v. Weaver*, 905 F.2d 1466, 1481 (11th Cir. 1990). For all of these reasons it is respectfully suggested that the United States Supreme Court should grant certiorari and address the issue.

2. An enhanced information is the exclusive tool of the Executive Branch and should not be subject to waiver

or forfeiture analysis.

a. Sufficiency of the enhancement information.

United States v. Severino, 268 F.3d 850 (9th Cir. 2001), observed that normal rules of waiver, forfeiture and prejudicial error *should* apply. *See* Fed.R.Crim.P. 52(a). Therefore, the fact that a defendant did not receive notice and failed to move for a continuance, or made no objection to the sentencing, and proceeded forward without the filing of an information waived the requirement of the statute. Where no objection is made, the decision to plead guilty was presumed to have been fully informed, especially where the defendant was informed of the maximum possible (enhanced) sentence, and that there was no basis for challenging the underlying conviction. Because defense counsel and the defendant were correctly informed of the nature of the charge and the maximum possible penalty (and especially in cases where the prior sentence is more than five years old), there is no real prejudice in failing to meticulously

comply with the procedures of 21 U.S.C. § 851. On that reasoning, formal defects as far as *sufficiency* of notice, including any improper statute citation, have been held subject to principles of waiver under a harmless error standard, *United States v. Garcia*, 954 F.2d 273 (5th Cir. 1992), because there could be no possibility that the defendant was confused about the existence of the prior conviction that subjected him to the enhanced minimum mandatory sentence. In such circumstances a waiver of formality of the content of the information has been regularly sustained or reviewed under plain error standards. *Cf. United States v. Davis,* 36 F.3d 1424 (9th Cir. 1994); *United States v. Steen*, 55 F.3d 1022, (5th Cir. 1995) [sufficiency of information review *de novo*].

b. Failure to file a sentence enhancement information.

The sufficiency of the notice/information requirement is subject to a different standard of review (plain error) than the

failure to file an enhancement information (*de novo*). A defendant may knowingly and intelligently waive the sufficiency of the notice, or the adequacy of the notice, by a number of stipulations in a number of proceedings short of requiring an information to be perfectly drafted in the form of an indictment. In the case where the United States Attorney files no information under the enhancement statute the district court logically cannot enhance the defendant's sentence based on the prior conviction. The government has completely failed to comply with the statute.

The defendant has actual notice. In order for the Executive Branch, as empowered by the Legislative Branch, to trigger the jurisdiction of the Judicial Branch to impose a valid sentence to the next higher level of statutory punishment, an enhancement information should be filed. Just as the discretion of the district court has been limited by the mandatory sentence

minimum/maximum mandatory sentence scheme by Congress,[9] the authority of the federal judge to enhance a sentence is limited by Congress to those cases where strict statutory compliance is present. A district court judge cannot depart upward without substantial compliance with the *filing* requirement of 5K1.1, U.S.S.G. The filing of the enhancement information is mandatory. The formality of the pleading filed by the United States in some substantial word form or fashion must inform the accused of the government's intent to (a) seek to enhance the sentence by (b) a prior felony conviction. "Congress intended to deny the courts the power to impose an enhanced sentence absent compliance with the procedures established in § 851." *Severson, supra,* 268 F.3d at 862. The sentencing court must be properly authorized by the United States Attorney, *United States v. Williams*, 59 F.3d 1180 (11th Cir. 1995). The discretion under 18 U.S.C. § 851 belongs to the

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[9]18 U.S.C. § 3553(e).

prosecutor, *United States v. Noland, supra*, 495 F.2d 529. If the government seeks a remedy, an enhanced sentence, it must ask for it by filing an information.

An enhancement information is an information in the legal sense [not mere notice]: a complaint or accusation presented against a person and charging a criminal offense filed at the discretion of a proper law officer of the government but without intervention of a grand jury. *United States v. Olson*, 716 F.2d 850, 851 (11th Cir. 1983); *United States v. Garza*, 954 F.2d 273 (5th Cir. 1992). In asking for the remedy, the United States Attorney must comply with the statutory procedure. The failure to comply with the statutory procedure of § 851 deprives the sentencing judge of the power to impose an enhanced sentence over the subject case and over the subject party.

A district court judge cannot reduce a sentence below a statutory minimum mandatory except and unless the United States Attorney files an information or motion requesting such

action.[10] The district court certainly has jurisdiction over the subject matter of the case and jurisdiction over the person within the territorial district. The district court has jurisdiction over the sentence. But the court is without authority (jurisdiction) to *reduce* the sentence in the absence of a timely filed pleading which can only be filed by the government. 18 U.S.C. § 3582(c)(1)(B). The court is deprived of that authority because Congress in enacting the elaborate sentencing code revisions initiated November 1, 1987, with the sentencing guidelines and subsequent amendments, together with the minimum mandatory statutory sentencing scheme has limited the federal court's jurisdiction, not merely its discretion, but its power to act on a sentence over which it has subject matter jurisdiction. *See* 18 U.S.C. §§ 3553(e), (f); 3559(c). To impose a sentence except in strict compliance with the statutory

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[10]18 U.S.C. § 3553(e) [Limited authority to impose a sentence below a statutory minimum]; 18 U.S.C. § 3582(c)(1)(B) [court may modify term expressly permitted by statute or Rule 35].

proceedings *as initiated* by the Executive Branch, through the Office of the United States Attorney, is prohibited. The notice sufficiency may be waived. But the "jurisdictional" requirement of the filing of an information may not be waived as it is mandated by Congress. 21 U.S.C. § 851; 18 U.S.C. § 3559(c)(4). An implied or constructive waiver by the defendant would be equated with the acquiescence of jurisdiction. The government has the discretion to invoke the jurisdiction of the court, if the government fails to act by filing an information, the court may not enhance the sentence by acquiescence of the defendant, any more than the court can grant a downward departure with a 5K1.1 motion.

3. The decision to depart upward, to remedy a perceived pleading error in the indictment, is clearly erroneous.

a. In Petitioner Dodson's case, he was not correctly informed for the maximum, or minimum, sentence actually

applicable in his case, prior to his plea as required by 21 U.S.C. § 851.[11] Petitioner Dodson was incorrectly informed at the plea proceeding that the sentence exposure was five to forty years. No enhancement information was filed. At or before sentence, he was never told the correct legal sentence he faced. Therefore the sufficiency of the notice is not the issue, because no sentence enhancement information was filed. The harmless error/plain error standard of review used by the Fifth Circuit Court of Appeals was not the appropriate standard of review. (Appendix, p. 18).

b. The argument of Petitioner Dodson as stated in section 2, above, is that the district court judge was without authority to *downward* depart without a motion under U.S.S.G. 5K1.1 (downward departure). The district court judge is

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[11]21 U.S.C. § 851(a)(1) provides in pertinent part:
No person who stands convicted of an offense under this section shall be sentenced to an increased punishment by reason of one or more convictions unless ... before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous conviction relied upon.

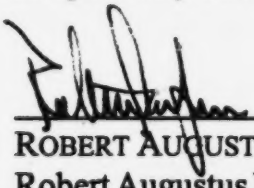
without authority to go below a statutory minimum without a motion under 18 U.S.C. § 3553(e) (limited authority to impose a sentence *below* drug statutory minimum).[12] In the absence of an enhancement information filed under 21 U.S.C. § 851(a)(1), the district court had no authority to impose an *upward* departure sentence which was twice that plead in the indictment.

[12]"Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence ...."

I. CONCLUSION

Given the recent line of cases, *Ring v. Arizona*, — U.S.—, 122 S.Ct. 2428 (2002), *Harris v. United States*, — U.S. —, 122 S.Ct. 2406 (2002), and *United States v. Cotton*, — U.S. —, 122 S.Ct. 1781 (2002), from the Supreme Court of the United States, the petition in this case presents important and substantial questions, both procedurally and substantively. The issues are ripe for resolution in the Supreme Court of the United States. It is respectfully requested that certiorari be granted and merits briefs be ordered.

Respectfully Submitted,



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COUNSEL FOR PETITIONER

Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2002

CUYLER A. DODSON,

Petitioner,

v.

UNITED STATES,

Respondent.

Appendix to
Petition for Writ of Certiorari
to the Fifth Circuit Court of Appeals

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED
DEC 06 2001

No. 00-60884

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

CUYLER A. DODSON
Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:00-CR-85-ALL-BS

Before KING, Chief Judge, and DAVIS and EMILIO M. GARZA, Circuit Judges.

IT IS ORDERED that the petition for rehearing is GRANTED.

IT IS ORDERED that the opinion issued on August 15, 2001 is hereby WITHDRAWN. The Clerk is directed to place this case on the oral argument calendar in February. The panel to which this case is assigned will make the determination as to whether it will be orally argued, and counsel will be advised later on whether to report for oral argument.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

FILED
APR 02 2002

No. 00-60884

UNITES STATES OF AMERICA,
Plaintiff-Appellee

VERSUS

CUYLER A. DODSON,
Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Mississippi

Before GARWOOD, JOLLY and DAVIS, Circuit Judges.
W. EUGENE DAVIS, Circuit Judge:

Cuyler A. Dodson appeals his guilty-plea conviction and sentence for simple possession of crack cocaine. He asserts that the district court erred in holding that he was subject to an enhanced

maximum of two years' imprisonment under 21 U.S.C. § 844 because the Government failed to file an information under 21 U.S.C. § 851 giving notice of its intent to use his prior drug conviction for that purpose. Dodson also asserts that the district court erred in departing upward to sentence him above the guideline range in denying Dodson's motion to suppress evidence. Finding no error, we affirm.

I.

Based on our review of the record, the district court was entitled to find the following facts from the evidence presented at Dodson's suppression hearing. Frank Bell and Nick Clark are part-time reserve captains with the Hinds County Sheriff's Department. On March 30, 2000, Clark received a tip from a reliable informant that drugs were being traded for sex at a house in Jackson, Mississippi and discussed that information with Bell. They recognized the address as having been the site of past drug arrests. Using their own unmarked cars, Clark and Bell proceeded to the house to confirm its location. As Bell approached the residence, he saw Dodson on the porch of the house. Dodson, an accountant with

a prior conviction for drugs, was wearing a suit and driving a Mercedes SUV. His affluence aroused Bell's suspicion, so he turned around to stop Dodson and talk to him. While Bell was turning around, Clark arrived and saw Dodson run to the Mercedes and drive away. When they saw Dodson drive through a stop sign, Bell turned on his blue lights to stop him. Dodson reacted by speeding away. Bell pursued Dodson for some distance until he found the Mercedes parked on the side of the road and performed a "violation of traffic ordinance" stop. Bell called Clark and told him of his location, then called in a check on Dodson's driver's license. Clark arrived while the check was being performed and read Dodson his *Miranda* warnings, either before or after the check came back.[1] The license check disclosed that Dodson had an outstanding warrant for driving with a suspended license. After being asked if there was anything in the vehicle the officers should know about, Dodson gave a matchbox containing cocaine residue to Clark,[2] who arrested Dodson for both

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[1]Clark testified that he read Dodson his *Miranda* rights after the outstanding warrant was discovered, while Bell testified that Clark read Dodson his rights before that point.

[2]One version of the story had Dodson giving the matchbox to Bell.

the warrant and the traffic violations. Bell then searched Dodson pursuant to his arrest and found two crack shooter pipes and multiple rocks of crack cocaine in the pockets of his clothing. Dodson exhibited mood swings during the stop, sometimes being cooperative and other times belligerently naming important people whom he knew. Dodson then signed a consent to search form which covered not only the car but also his house, six miles away. He then volunteered to take the officers to his home and show them his additional narcotics. The officers searched the Mercedes thoroughly, finding marihuana in the glove compartment.

On May 10, 2000, Dodson was indicted on two counts: possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1) and simple possession of 9.5 grams of cocaine base in violation of 21 U.S.C. § 844(a). He filed a motion to suppress, which the court heard on August 3 and 8, 2000. After hearing the testimony, the district court denied the motion even before the attorneys made their closing arguments. The next day, Dodson entered a plea agreement which required him to plead guilty to the second charge in return for dismissal of the felon in possession

charge; Dodson reserved the right to appeal the denial of his motion to suppress. At the plea colloquy, the parties disputed the quantity of drugs but further debate on this issue was postponed until the sentencing hearing.

At the sentencing hearing on October 20, 2000, the government moved to withdraw its plea agreement because it had misunderstood the effect of *Apprendi* on the drug quantity issue.[3] The government's concern was that under *Apprendi*, its failure to prove the quantity of drugs at the plea colloquy would limit Dodson's maximum sentence to two years instead of twenty. A discussion ensued as to what the maximum sentence would be under various scenarios regarding number of prior convictions and quantity of drugs under 21 U.S.C. § 844. The court continued the hearing and requested briefing on whether the government could withdraw its plea agreement.

At the second hearing on November 7, 2000, the government abandoned its motion to withdraw the plea agreement and announced

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[3] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

that an agreement had been reached with the defendant that the appropriate penalty would fall within the section of 21 U.S.C. § 844 that applies to a defendant with one prior conviction and no drug quantity proven. The sentencing range under that provision is not less than 15 days, not more than 2 years, and a fine of not less then $2,500. The government then asked the judge to sentence Dodson to the full statutory maximum.

The court sentenced Dodson to the full two years, departing upward from the guideline range of zero to six months. The court felt that several factors justified the upward departure, including the government's error in charging him under a statute that did not take the full 9.5 grams of crack cocaine into account, his prior convictions (which could not be used to increase his criminal history category), the felon in possession charge which had been dismissed, his testing positive for drug use while on bail, and his disregard for the law as evidenced by his braggadocio during his arrest.

Dodson timely appealed.

II.

The only substantial issue in this appeal is Dodson's

argument that the district court erred in enhancing his sentence above the statutory maximum of one year, under 21 U.S.C. § 844(a), because the government did not file a notice of intent to seek an enhanced sentence on the basis of a prior conviction as required by 21 U.S.C. § 851. The grand jury indicted Dodson under 21 U.S.C. § 844(a). Section 844 provides various punishment ranges for simple possession of a controlled substance. The base statutory maximum is one year. If the defendant has a prior drug conviction, the sentence range increases to 15 days to 2 years.[4] The district court sentenced Dodson to 24 months imprisonment under this higher sentencing range.

Dodson argues that this was improper because the government failed to comply with the notice procedures of 21 U.S.C. § 851. Section 851 states:

> No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the

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[4] 21 U.S.C. § 844(a).

> person or counsel for such person) stating in writing the previous convictions to be relied upon ...

The government concedes that it did not comply with this provision by filing a separate information document. Dodson did not object to the lack of information at any time in the district court.

The briefs and argument of the parties raise three issues. First whether the requirements of 21 U.S.C. § 851 can be satisfied by other filings and admissions. Second, whether Dodson waived his right to contest the lack of information filing by the government, and finally, whether Dodson forfeited his right to have this error corrected by failing to object to the lack of information before the district court. We will address each issue in turn.

A.

First, the government suggests that the indictment in this case, along with other filings and statements by the defendant, satisfies the requirements of 21 U.S.C. § 851 because it contains the correct name of Dodson's prior offense, its date, venue and cause number and was served on the defendant. Count 1 of the indictment charged Dodson with a violation of 18 U.S.C. § 922(g)(1) and

924(a)(2), knowing possession of a firearm by a convicted felon and identified the underlying prior conviction as possession of marijuana more than an ounce on March 14, 1984, in the Circuit court of Hinds County, Mississippi, in Cause No. X-1108. During the suppression hearing, the defendant testified that he had previously been convicted of the drug offense in question and that the conviction had been affirmed by the Supreme court. Also, the Presentence Investigation Report noted the 1984 felony drug conviction at paragraph 33. Dodson did not object to the validity of the conviction in his objections to the PSI. The government argues that based on this information the defendant received complete and accurate information regarding his prior conviction in writing, filed with the court and served on him, which satisfies the requirements of § 851. We disagree.

One goal of the Comprehensive Drug Abuse Prevention and Control Act of 1970, of which 21 U.S.C. § 851 is a part, was to make the penalty structure for drug offenses more flexible.[5] Whereas the

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[5] *United States v. Noland*, 495 F.2d 529, 532-33 (5th Cir. 1974).

prior version of the statute made enhancements for prior offenses mandatory, the new statutory scheme gave prosecutors discretion whether to seek enhancements based on prior convictions.[6] Accordingly, the statute established in § 851 the requirement that the government inform defendants of its decision to seek enhancement and the prior convictions to be relied upon in the proposed enhancement.[7] Although the information in the indictment and PSI might serve to inform Dodson of the government's knowledge of his prior conviction, it does not accomplish the main purpose of § 851 which is to inform the defendant that the government intends to seek a sentencing enhancement based on that conviction. Dodson's lack of surprise and admission of his prior conviction cannot overcome the government failure to file the information required by § 851.[8]

B.

Dodson argues further that the requirement in § 851 to file the information as a prerequisite to sentencing enhancement is

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[6] *Id.*, at 533.

[7] *Id.*

[8] *Id.*

absolute. Dodson does not go so far as to say the district court is without jurisdiction to sentence him. At oral argument counsel for Dodson conceded and we agree that whether or not the government files a timely information under § 851, the district court had subject matter jurisdiction over his case under 18 U.S.C. § 3231. See also United States v. Severino, 268 F.3d 850, 856-57 (9th Cir. 2001).[9] Rather his position is that the requirements in § 851 are not waivable or subject to forfeiture as a result of his failure to object. Again, we disagree.

Waiver and forfeiture are two different means by which a defendant may react to an error made by the government or the district court in the proceedings in his case. Waiver is the "intentional relinquishment of a known right."[10] it occurs by an

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[9]Although certain cases in this circuit and others have referred to the requirement in § 851 as "jurisdictional," we read those cases as referring not to subject matter jurisdiction but rather to the district court's authority to impose a specific sentence. *United States v. Cevallos*, 538 F.2d 1122, 1125-26 (5th Cir. 1976) (interpreting *United States v. Noland*, 495 F.2d 529 (5th Cir. 1974) to mean that filing of the information is a jurisdictional requirement.) A court with proper subject matter jurisdiction can exceed its authority or commit other error without loss of jurisdiction. *United States v. Severino*, 268 F.3d at 857.

[10]*United States v. Olano*, 113 S.Ct. 1770, 1777 (1993), quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L.Ed. 1461, 58 S.Ct. 1019 (1938).

affirmative choice by the defendant to forego any remedy available to him, presumably for real or perceived benefits resulting from the waiver. We recognize that whether a particular right may be waived, whether the defendant must personally participate in the waiver, whether certain procedures are required to properly effect a waiver and whether the defendant's choice must be specifically informed or voluntary all depend on the particular right at stake.[11] Considering the right protected by § 851, we see no reason why the rights afforded under that statute may not be waived.

We start from the premise that waiver is presumptively available absent some sort of express statement otherwise.[12] "A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution," including the double jeopardy defense, the privilege against compulsory self-incrimination, the right to a jury trial, the right to confront one's accusers, and the right to counsel.[13] The Supreme

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[11] *Olano*, 113 S.Ct. at 1777.

[12] *United States v. Mezzanatto*, 115 S.Ct. 797, 801 (1995).

[13] *Id.*

Court has specifically stated that "absent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties."[14] There is no indication in 21 U.S.C. §851 it was intended to be an absolute, nonwaivable requirement. The rule in § 851 does not affect any fundamental constitutional right, which might weigh against allowing waiver of its requirements. Further, waiver of the requirement of filing an information in this statute furthers and is consistent with the practice of allowing plea agreements by criminal defendants. We join the Ninth and First Circuits in concluding that, in the absence of a jurisdictional defect or other compelling reason, nothing prevents an informed defendant, represented by an informed attorney, from waiving the requirements of § 851.[15] Waiver extinguishes an error, taking it out of Federal Rule of Criminal Procedure 52(b).[16]

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[14] *Id.*

[15] *United States v. Severino*, 268 F.3d 850, 858 (9th Cir. 1001); *Prou v. United States*, 199 F.3d 37, 47 (1st Cir. 1999).

[16] *Olano*, 113 S.Ct. 15 1777.

If, as in this case, a legal rule is violated and the violation is not waived by the defendant, an error occurs within the meaning of Rule 52(b).[17] Forfeiture is "the failure to make the timely assertion of a right," generally by failure to object to an error in the proceedings.[18] In the absence of an objection, the error is forfeited, meaning that plain error review applies.[19] We see no reason why the provisions of § 851 should not be subject to forfeiture. The same rationale applied above supports a conclusion that "[b]ecause section 851(a)(1)'s temporal requirements exist for the defendant's benefit, it makes perfect sense to give the defendant the power to waive (and the obligation not to forfeit) strict compliance with them."[20] The Supreme Court has warned against the creation of exceptions to Rule 52(b), warning that courts have no authority to do so.[21] It applied the plain error review standards of Rule 52 to the failure to submit an

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[17] *Id.*

[18] *Id.*

[19] *Id.*, Fed. R. Crim. Proc. 52(b).

[20] *Prou v. United States*, 199 F.3d at 47.

[21] *Johnson v. United States*, 520 U.S. 461, 117 S.Ct. 1544, 1548 (1997).

element of the offense to the jury.[22] Although the seriousness of the error claimed is not a factor in deciding whether Rule 52(b) applies, it seems clear to us that if Rule 52(b) applies to an error in jury instructions, it must certainly apply to the requirements of § 851.

C.

Having decided that § 851 is subject to both waiver and forfeiture, we turn now to the record to determine if Dodson waived or forfeited his rights under that statute. The argument that Dodson waived any failure by the government to file the information required by § 851 is based on the following sequence of events. First, Dodson pled guilty only to possession of cocaine charged in Count 2, leaving open the issue of drug quantity until sentencing, in exchange for the government dropping the gun charge in Count 1. Between the guilty plea and the first sentencing hearing, the parties became aware of the effect of the Supreme Court's decision in *Apprendi* on the lack of agreement as to drug quantity. The government sought to set aside the plea agreement. If the government had been able to set aside the

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[22] *Id.*

plea agreement, Dodson would have been faced with the charges under Count 1 and the risk of significantly more jail time. The district court directed the parties to brief the issue of whether the government could set aside the plea and what sentencing range should apply to Dodson. At the second sentencing hearing, the government announced that it was withdrawing its motion to set aside the plea agreement. The government also agreed that one of Dodson's prior convictions for a drug-related charge, which had been expunged, could not be counted against him and that Dodson did not contest the validity of the 1984 drug conviction. Then, the following exchange took place:

> [PROSECUTOR] The other matter was a sentencing range for this matter. Given the decision in *Apprendi* and the resulting effects, counsel for the government and for the defense agree that under Title 21, Section 844, the appropriate penalty would fall within the section of that statute that provides that the defendant who has one prior conviction be sentenced to a term of not less than 15 days, not more than two years, and a fine of not less than $2,500.
>
> THE COURT: All right. Mr. Collette, do you agree with the statements just made to the court by the Assistant United States Attorney?

MR. COLLETTE: I believe so, your Honor.

By agreeing that the appropriate sentencing range was 15 days to two years, Dodson, through his counsel necessarily agreed that his prior conviction would be applied to enhance his sentence. Although Dodson was not specifically queried regarding his understanding of this agreement or his acquiescence in it, we are satisfied that Dodson, through the actions of his counsel waived his right to contest the lack of information under § 851. Clearly, it was to his benefit to maintain the plea agreement and thereby avoid the risk of reinstatement of the gun charge. His agreement to allow sentencing enhancement without compliance with § 851 allowed him to do so.

Alternatively, and even if Dodson did not waive § 851's requirement that the government inform him of its intent to enhance his sentence based on the 1984 conviction, we are satisfied that he forfeited his right to complain of this error by failing to object. If Dodson had objected to the failure to file the required information, there is no question that precedent in this circuit would require us to

remand for reduction of sentence.[23] In light of his failure to object however, we must apply Rule 52(b) to this forfeited error. Before an appellate court can correct an error not raised at trial, "there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affects substantial rights.' If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'"[24] the court's imposition of a two-year sentence under these circumstances where the government failed to file the information required by § 851 is an error, that is obvious and affects Dodson's substantial rights as it resulted in an enhanced sentence. However, we conclude that the lack of the bill of information in this case did not seriously affect the fairness and integrity of the judicial proceedings. As noted above, Dodson agreed that his prior conviction was valid, had notice that the government was aware of his criminal history and agreed to the sentencing range

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[23] *Noland*, 495 F.2d 529 (5th Cir. 1974).

[24] *Johnson v. United States*, 520 U.S. 461, 117 S.Ct. 1544, 1549 (1997) (internal citations omitted); *Olano*, 507 U.S. at 734, 113 S.Ct. at 1777.

that resulted from the application of the enhancement. Dodson had a number of lucky stars that lined up in his favor in this case. The recent *Apprendi* case prevented the government from asking for sentence enhancement based on drug quantity, which it almost surely planned to do when it agreed to drop the gun count in the plea agreement. The government then decided to abandon its motion to withdraw the plea. Dodson has never asked to withdraw his plea and does not seek to do so now. Given the quantity of drugs that were involved and the mandatory sentence he faced on the gun count, Dodson received a much lighter sentence than he had any reason to hope for. No "miscarriage of justice" will result if we do not notice this error.[25]

III.

Dodson argues next that the district court abused its discretion in granting an upward departure based on several aggravating factors. A decision to depart from the guidelines is

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[25]*Olano*, 507 U.S. at 736, 113 S.Ct. at 1779.

reviewed for abuse of discretion.[26] The district court listed the following bases for upward departure: the quantity of drugs in Dodson's possession, uncounted prior criminal history, the dismissed firearm charge, and Dodson's disregard for the law as evidenced by his behavior at the time of his arrest and continued drug use while free on bail. All of these factors are proper factors on which to base an upward adjustment and taken on a cumulative basis are more than adequate to support the district court's decision to depart from the guideline range.[27]

IV.

Finally, Dodson argues that the district erred in denying his motion to suppress. Based on our review of the record, the district court had substantial evidence from which to conclude that Dodson consented to the searches after being properly informed of his

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[26] *Koon v. United States*, 518 U.S. 81 (1996); *United States v. Wilder*, 15 F.3d 1292, 1300 (5th Cir. 1994).

[27] *United States v. Keith*, 230 F.3d 784 (5th Cir. 2000) (drug quantity); *United States v. Ashburn*, 38 F.3d 803 (5th Cir. 1994) (prior criminal history and dismissed counts); *United States v. Juarez-Ortega*, 866 F.2d 747 (5th Cir. 1989) (possession of a weapon); *United States v. George*, 911 F.2d 1028 (5th Cir. 1990) (post-arrest conduct); also U.S.S.G. § 4A1.2(j) (expunged convictions); U.S.S.G. § 5K2.21 (charges dismissed as part of a plea agreement).

Miranda rights. These findings were not clearly erroneous.

V.

For the foregoing reasons, Dodson's conviction and sentence are AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED
MAY 08 2002

No. 00-60884

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

CUYLER A. DODSON
Defendant - Appellant

Appeal from the United States District Court for the
Southern District of Mississippi, Jackson

ON PETITION FOR REHEARING

Before GARWOOD, JOLLY, and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is *denied.*

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge